The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Terminal Operating Co., Inc.

File: B-229591; B-229591.2

Date: March 18, 1988

DIGEST

1. Protest that awardee did not comply with alleged solicitation requirement that the cost of all clerks performing specified services be included on a fixed-price schedule is denied where the solicitation allowed each offeror to decide on the size and composition of its fixed-price staff and did not prohibit the pricing of clerks in the rates quoted on variable-quantity schedules.

2. Protest that the awardee's offer was mathematically and materially unbalanced is denied where the protester has demonstrated neither that awardee's prices do not reflect cost plus profit nor, assuming such mathematical unbalancing, that acceptance of the offer cannot be expected to result in the lowest cost to the government.

DECISION

International Terminal Operating Co., Inc., protests the award by the Department of the Army, Military Traffic Management Command, of a fixed-price, indefinite-quantity contract to Universal Maritime Service Corporation under request for proposals (RFP) No. DAHC24-87-R-0001. The contract is for operation of the Military Ocean Terminal, Bayonne, New Jersey, during a 2-year period, with an option for 1 additional year. We deny the protest.

The RFP described the services to be performed as consisting of "commodity services" and "related terminal services." Under the commodity services part of the contract, the contractor will be required to provide labor, equipment, and material for stevedoring and other cargo-handling services. The contractor will be paid for commodity services in accordance with prices submitted on various schedules. For example, Schedule IA-1 listed various commodities, such as household goods and government vehicles, and required offerors to submit fixed prices (per metric ton or per unit) for loading and unloading the commodities from vessels. Other schedules required prices for loading and unloading railcars or trucks. For each commodity, the RFP listed an estimated quantity. The RFP also contained "miscellaneous hourly rate" schedules for labor categories--such as longshoremen, foremen, and checker/clerk--and listed estimated quantities of hours for straight time, overtime, and other differentials.

With respect to related terminal services, the contractor is to provide a full-time staff to plan, organize, control and support the stevedoring and cargo-handling work. The RFP required each offeror to submit a fixed monthly charge for the related terminal services on Schedule IX. The solicitation advised that this rate included overtime and that the contractor's full-time staff would not be subject to the manhour rates on other schedules. Award was to be made on the basis of the lowest "overall gross dollar amount of all schedules."

The agency received offers from Universal and the protester. Following discussions and two rounds of best and final offers (BAFOs), the agency selected Universal for the award because of its lower evaluated price. The protester's total evaluated price of $30,975,607 was more than $4 million higher than the awardee's evaluated price of $26,602,716.

The protester has raised two related grounds of protest. First, the protester contends that the awardee failed to price all clerks performing related terminal services under Schedule IX, but instead improperly included the cost of some of these clerks in the prices entered on the commodity services schedules. The protester argues that the agency should have rejected the proposal because it did not conform to what the protester contends was a solicitation requirement to include the cost of clerks performing related terminal services only in Schedule IX. Alternatively, argues the protester, the agency should have advised it that this requirement no longer applied. Second, the protester contends that the awardee's offer was mathematically and materially unbalanced because the awardee underpriced the terminal services on Schedule IX while inflating the prices of some commodity services.

Regarding the first ground of protest, we find no merit to the argument that the awardee's proposal failed to comply with solicitation requirements. The RFP provided that the monthly compensation indicated on Schedule IX was for the full-time staff performing related terminal services, as designated in the offeror's proposal. The solicitation did not specify any required level of effort for these services, but allowed each offeror to determine the size and composition of its full-time terminal services staff. The agency reports that the protester included "temporary" clerks as part of its fixed-price terminal services staff, and that the awardee included some clerks in its Schedule IX staff while including part of the cost of a "clerking pool" in its commodity services rates.1/ We find nothing in the solicitation that would require or prohibit either of these approaches. Further, the contracting officer determined, in the absence of specific requirements in the RFP for an offeror's terminal staff, that each offeror had proposed a staff adequate to perform the work required.

We note in this regard that the solicitation provided that full-time Schedule IX staff would not be eligible for separate payments under Schedules II through IV-C, the miscellaneous hourly rate schedules, and listed specific categories of labor to which this provision would apply; amendment No. 0002 added both chief clerks (head checkers) and clerks to the list. We do not agree with the protester, however, that by adding clerks to the list the agency was specifying this labor category as one that must be included on Schedule IX and that could not be a component of the commodity rates. Rather, as we read Schedule IX, as amended, the list of labor categories was intended to inform offerors that the cost of those personnel in listed categories that were identified on a proposal as being part of a full-time terminal services staff would not be eligible for payment under the miscellaneous hourly rate schedules. Amendment No. 0002 merely recognized the possible use of full-time clerks as part of an offerors' terminal services staff and did not prohibit an offeror from including the cost of clerks in the commodity schedules.

The protester's second contention is that the awardee's offer is mathematically and materially unbalanced. In this regard, the protester notes that there is a considerable variation between the protester's and the awardee's prices for some of the commodity services. The protester argues that both offerors' prices should be similar since both have virtually identical costs.

We have recognized that the concept of material unbalancing may apply in negotiated procurements where, as here, cost or price constitutes a primary basis for source selection.

1/The protester's 24-month price for Schedule IX services was $15,441,947; the awardee's price for Schedule IX was $9,304,731.

Merret Square, Inc., B-220526.2, Mar. 17, 1986, 86-1 CPD ¶ 259. An offer is materially unbalanced where it is based on nominal prices for some work and enhanced prices for other work, and award based on such a mathematically unbalanced offer cannot be expected to result in the lowest overall cost to the government. Semcor, Inc., B-227050, Aug. 20, 1987, 87-2 CPD ¶ 185. Usually, the key to this latter determination is the validity of the government's estimates, since it is the estimates (multiplied by proposed rates) upon which the projected cost to the government is determined. Unless the solicitation's estimates are inaccurate, a low evaluated offer generally is not materially unbalanced. Id. In this case, the agency contends that it based the workload estimates contained in the RFP on known as well as projected requirements, and that it updated the estimates through a solicitation amendment as late as September 1987, just weeks prior to receiving BAFO's.

The protester does not argue that the estimates the agency included in the RFP were not the best available at the time. Rather, the protester's position is that the agency should have reassessed the estimates in light of the awardee's offer because commodity prices that are higher than the agency anticipated will disrupt the normal traffic flow by diverting cargo to lower-priced ports. The protester contends that if cargo actually shipped through Bayonne falls short of the estimates, the awardee may file a claim against the government based on defective estimates.

We find no merit to the argument that the agency was required to reject the awardee's offer as materially unbalanced. First, although some of the awardee's commodity services prices are substantially higher than the protester's, and some are lower, this alone does not establish that the awardee's prices do not reflect the cost of the work plus a proportionate share of the profit. As the agency points out, a number of factors may account for such variations in line item pricing, not the least of which is that each of the awardee's commodity prices includes a share of the costs of the clerking pool.2/ While the record shows that the awardee and the protester used different approaches in pricing their offers, there has been no showing that the awardee's prices do not reflect cost plus profit.

In any event, even if we were to assume that the awardee's pricing was mathematically unbalanced, the protester has not provided a sufficient basis to doubt that award to Universal

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2/Other variables include management efficiency and the type of equipment used to perform the work.

will result in the lowest cost to the government. As indicated, the protester does not contend that the workload estimates the agency included in the RFP were not based on the best current information, but argues instead that the workload is likely to be less than estimated because the awardee's higher commodity rates can be expected to cause the diversion of cargo to other ports. In this regard, the agency discounts the possibility of a significant diversion of cargo since a number of factors--such as the costs of inland and ocean transportation--affect decisions concerning whether to ship through particular ports, and there is some cargo that must be shipped through Bayonne in any event. More importantly, however, the awardee's price was more than $4 million lower than the protester's price under the evaluation scheme set forth in the RFP, and we do not think the protester's speculation that Universal's pricing approach might distort the expected cost of contracting with the firm warrants evaluating offers on a basis other than that stated in the RFP.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel